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THE SOCIAL PROBLEM: LEGAL PRINCIPLES INVOLVED IN ITS SOLUTION†

CONNOR D. ROSS*

The worldwide social upheaval—the most destructive of all time—has inspired a renewed effort to solve the problem of our human relationships. Various arguments are being made to point out the causes of this raging catastrophe. However wide the differences of opinion as to cause may be, there is general agreement that some method should be devised to end war for all time.

There are those who contend that this end may be accomplished by agreement or compact among nations. But government itself—especially in our America—is a compact—an agreement between individuals, as such, and the group, as such; and the ends said to have been accomplished are couched in platitudes noble and inspiring. These precepts of justice have come down through the years from our forebears; and, though they are generally accepted as truths in the abstract, the assertion is not infrequent that policies that were right in the days of the founding fathers are inadequate for a changing world.

Has our compact accomplished in practice the ends we proclaim in precept and platitude? If it has, why this unrest and dissatisfaction? Is representative democracy an end in itself? Can justice be established by mere majority vote?

I. Commonplace Observations—Their Importance

Representative democracy is worth saving because our mistakes are of our own making. We have no one to blame but ourselves. The system avoids revolution and bloodshed. But to undertake to establish justice among men solely by majority vote is a futile gesture. A principle is always a principle. If our precepts of justice do not work in practice, they are either not precepts or we have failed to construct a governmental mechanism that gives them sway. I

† Editor's Note: Because of Judge Treanor's deep interest in the economic and jurisprudential aspects of the law it is particularly appropriate to publish this article of Mr. Ross' in this issue of the JOURNAL.

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think the error lies in the construction of our social compact. Until we correct our own mistakes in government, I doubt the wisdom of the proposal to set up a compact for the world. If we can save representative democracy by making it work, perhaps the example would be sufficient in itself to save the world.

I think the error in our governmental and economic calculations is in the treatment with truths that are so commonplace that they have ceased to be recognized as of importance. These truths are in the class described by Samuel Taylor Coleridge as being "so true they have lost the power of truth," having fallen into a state of "neglect caused by the very circumstance of their universal recognition." We have become so confused by the so-called "conditions of a new age" that we see nothing but the conditions. The search for cause has ceased, and, as statesmen, we resort to the antiquated method in medicine of treating symptoms. The proposals therefore are varied and usually meaningless.

The mention of but one example of the various proposals for the cure of social ills should prove the point—namely, that we should have either a "liberal" or a "conservative" or a "middle-of-the-roader" to administer the remedy, depending upon the temperament of the persons doing the choosing. The assumption that there could be a liberal or a conservative or a "fifty-fifty" law should have no more standing in the Science of Law than in the Science of Chemistry.

In this discussion I shall attempt to pick up a few commonplace truths and give them the prominence that I think they deserve.

Government involves a relationship of the individual to the group. That relationship embodies the idea of preservation. In the last analysis, I think the social compact is based on well-recognized laws of Nature—the law of self-preservation, said to be the first, and the law that impels every living thing to seek the course of least resistance. It is natural therefore for man to seek the gratification of his desires with the least possible exertion. Both of these laws embody the idea of *saving*—the saving or preserving of life and hence the saving of labor and of property rights. It

is this thought that suggests closer observation of the commonplace.

(a) Labor Saving and Lost Opportunities

There is hardly a subject upon which we have heard more and know less, I think, than that of saving. We cut through the field and pasture wood to save time. Benjamin Franklin was an advocate of daylight-saving two centuries ago. He proposed that people retire and rise early to save candles. In our youth we were taught to save about everything from *sole* to *soul*—and the story of the prodigal was held out as a demonstration of how we could lose both. We are taught not to eat too much nor too little if we would save our lives. For the same reason we should exercise our minds and muscles, but not to the extent of drudgery and slavery. To work for the joy of the working brings forth the man that Nature intended one to be. Slavery impoverishes both slave and master. The drudgery of the slave is compensated in the idleness of the master. Neither becomes the man Nature ordained him to be.

In the great game of life, however, Mother Nature never loses. She runs the table and holds the stakes. Come what may, gains or losses, the penurious, the penniless and the profligate, she gathers to herself and her scales are always in balance. Her storehouse is ever full and overflowing. She ever provides enough—more than enough—to go round. But she does not concern herself with the parceling out of her bounty in distributive shares. If we promote a system under which one may be master and grasp that which he does not earn, then another must accept less than he earns—and each must take the punishment. Neither has lived the man he was capable of living. There was no saving in either case.

If activity, mental and physical, is beneficial and drudgery detrimental to mankind, there must be a place in Nature's set-up for wholesome pleasure.

Labor-saving devices therefore would seem to have a place. If not, then all our teaching has been in vain—and the farmer should go back to the grub-hoe, the operator of the steam shovel to the pick and spade, and the housewife to the spinning wheel.

The user of the labor-saving device should get as much satisfaction out of operating it as the inventor enjoyed in

devising it, and both should have more leisure and the joys of living than they had before. The burden bearers—the slaves to drudgery—should derive as much satisfaction in helping make the devices as either the inventor or the operator. In turn, all these workers should enjoy life as freemen—the free indeed whom the truth has made free.

How can we have labor-saving devices and still have enough work to go round? Before that question we stand perplexed and seemingly helpless. The answer is: there is not enough drudgery to go round. There is, however, enough work, pleasure and opportunity to go round. The unnecessary burden of toil is no more befitting now to the highest ideal of creation than it was to a lily two thousand years ago.

If Nature still has in her grasp all the losses and gains, then the saving of lives from drudgery and slavery is compensated or reflected in the opportunities thus opened up for pleasure, recreation, and further development of the arts and sciences. But here the question of processing the bounties of Nature is just as it was before. Nature does not distribute; she merely provides.

Have opportunities been lost in this transition? Ask yourself if Invention and Discovery in opening up opportunities for pleasure have not at the same time opened up corresponding fields of activity. Would you go fishing, or yachting, or hunting or golfing or would you prefer to climb the Matterhorn? How would you go? By train, or automobile or airplane? Do these things afford no work for others? What would you take with you? Could you fish without a pole and tackle, play ball without bat, ball or glove, or hunt without a gun? Could you read without a book or printed page, grow flowers without land and tools, or paint a picture without brush and paint? If not, would you produce yourself this equipment for exploring the new frontiers of pleasure now opened to all—not just a few—or would you exchange the fruits of your own labor for the equipment—the products or the labor of others?

Why can't we—all of us—do these things now? We have not learned the lesson of saving. We have learned only how to abolish drudgery. There is just as much time for activity as there ever was so far as the laws of Nature are concerned.

Where then are these opportunities? They are all about

us, awaiting exploration—not exploitation. The truth is we have taken away with the one hand as fast as we have gained with the other. The gain we have made through discovery and invention has been lost in the social setup. Progress and retrogression are at a sort of stalemate.

(b) Exchange—as a Labor-Saving Device

The conditions suggest a question of saving that lies deep in our economic calculations. To illustrate, let us think of a farmer entering upon a virgin tract of land without improvements. In the illustration, I shall assume the existence of a correct system and later point out the defect in the system now in operation.

If the farmer is to operate successfully, he must have a house, a barn, fencing and perhaps ditching and tiling. He hasn't sufficient means to make these improvements, but he has the ability, mental and physical, to install and pay for them in the future. He, therefore, procures a loan—in other words, sells bonds based on his ability together with the increased utility of the farm, and agrees to pay the loan in the future. The improvements, like the tools with which he works, are labor-saving conveniences.

The fencing keeps his own livestock in, the other livestock out, and he may go about his work of raising crops without taking time out to prevent his livestock from running wild. The drainage saves time in that he can raise a larger and better crop in one year than, without it, he could raise in perhaps two years. The other improvements suggest similar advantages. Under an orderly system, he has no doubt, nor does his creditor, of his ability to meet through yearly installments his obligation advanced to him in the form of a loan.

It would be impossible to determine the number of his fellowmen that the farmer has in effect employed to aid him in the buying and the improving of his farm, or the number that aid him in paying for it through the exchange of his products. Had it not been for these fellowmen whose transactions are represented on each side of the ledger, he would not have undertaken the venture to own the home in the first place. In other words, the principle of saving was the basis of the venture—saving, in the sense of *establishing*, *preserving*, and *protecting* the rights of property. In the

absence of these opportunities and the security that accompanies them—the privilege of *exchange* or *division of labor*—he could not stand out as the *individual* or the man of which he was capable. He would have been merely a man whose identity was lost in the group as a primitive of the race—a savage seeking a bare subsistence by brute force. The land would have had no distinctive character and consequently no value because of the absence of the privilege of exchange with his fellows.

Since his venture presupposes exchange or the division of labor—a practice not developed by man in a state of nature—it is not difficult to see that the labor bestowed on the land by way of improvements—or labor saving devices—caused the land to take on a value equal to the cost of the improvements. That value merely represents, so far as the illustration goes, the labor of himself and that of all whose labor, directly and indirectly entered into the improvements. That value attached to the farm—not to him.

The value of all this labor, except his own, through exchange has been advanced to the farmer and he has obligated himself to pay off the advancement, through exchange, in the future.

It would be an interesting but an endless task to visualize the myriads of transactions involved in the farmer's venture to own and to improve his farm as a homestead. It would be impossible for him to trade directly with, or to determine how much to pay, each of the men who has contributed labor toward the venture. But it is evident, under an orderly system, each so contributing has been paid.

The value of the work of each has been added to the things that have gone into the improvements. To get an idea of how this has been done, one may start with a chunk of rough ore in the depths of the earth and trace it, through the various processes of exchange, until it becomes installed as a part of the fence on the farm. In each of the steps of this long and interesting journey, the piece of ore would advance, due to labor bestowed on it, from zero in value as a fragment of the earth to its proportionate worth of the finished product in the form of a fence.

In this illustration of the home builder I have taken merely a glimpse at a vast system of mutual commerce or division of labor involved in the venture.

(c) Natural Opportunities for Exchange

It should be observed in the illustration that the value of one's labor is manifested objectively—that is, it attaches to, or is reflected in or upon, objects or beings beyond himself. This is true even though there is a certain satisfaction that comes to the laborer himself because of his own ability and of work well done. This feeling would necessarily be reflected to him from his fellowmen who reaped a benefit from his good work—whether the work consisted of the digging of a ditch, the operation of a machine, the keeping of books, the painting of a picture, or the composition of a masterpiece of literature or of music.

The distinction that some modern statesmen attempt to make between "property rights" and "human rights" is therefore, to me, a mere play upon words. The piece of ore in place in the earth is valueless and would ever remain so if no labor, mental and physical, were applied; and likewise a masterpiece of music heard only by the composer himself would be as a light hidden "under a bushel." Human rights involve relationships among men as social beings—that is, they involve exchange in various forms.

It is therefore important to bear in mind that labor properly applied *always registers a value somewhere*; and, if it does, justice demands that the laborer should receive its equivalent in return.

Exchange then, under an orderly system, should be based on principles of justice. In each transaction the party or parties on either side should be benefited. The benefit arises from a difference in wants. If one receives more than the value of his labor, physical and mental, that has gone into the thing he exchanges, then the other must accept less. In that event, there has been no economic gain but rather an economic loss, since the repetition of the practice results in many of the losers becoming dependents or liabilities of government—aimless nobodies, paupers, defrauders or criminals. That is indeed a loss.

The benefit then of free and fair exchange is that the traders have the privilege of doing the work for which they are respectively adapted. The privilege of exchange promotes a higher standard of living through the developing of labor saving devices, the arts and sciences, and fosters

the principle of individualism. Man, in other words, moves out of that status of sameness to which he was doomed as a primitive and takes on a distinctive character—whether it be farmer, mechanic, butcher, baker, bookkeeper, preacher, poet or a giant operator of industry.

These differences in men as members of society, in turn, result in a breadth of differences in wants and desires and offer vast opportunities for exchange. Mankind as members of society therefore are in position to fit into the full scheme of things set up by Nature. But what a weak attempt have we made in observing, exploring and possessing the earth upon which we live!

The earth seems to have been made right. It rolls round the sun in such manner as to distribute heat of varying degrees. It wobbles just enough in the process to bring about what man defines as seasons. In the first operation, the sun distributes heat accurately enough that man has set bounds with reference to temperature. The divisions of the earth thus made, he defines as zones. Naturally enough each of these zones is peculiarly adapted to the production of certain things beneficial to mankind. In fact the temperature within a particular zone varies enough that certain things may be produced in a part of it that cannot be profitably produced in another part.

Mankind undertakes to live in each of these zones and in different parts of the same zone. The lower animal, as a kind, does not do this, since, as a kind, the brute cannot adapt himself to wide variations in climate. Why? I should say, because man can think and the brute cannot.

Man can endure temperatures ranging from ninety degrees in the shade to twenty or even fifty degrees below zero. He accomplishes this by a shift of clothing; and a change of diet helps to an extent. In the low temperatures of winter he needs garments of heavy cotton and wool fabrics; and those topped with fur produced in the Frigid Zone are not out of place. In the high temperatures of summer, the light cotton and mohair garments come into play.

In this wondrous scheme of Nature, one visions vast and unending opportunities for exchange. Man has barely scratched the surface of the earth upon which he lives. Any fertile mind may add myriads of opportunities to the few mentioned that should be opened up by reason of the dif-

ferences in the individuals themselves and the differences in their environment and modes of living.

(d) Exchange Is Production

Exchange is part of the work of production. If that is not true, it would be interesting to see a line drawn that would set apart the producers of the land. The mechanic who devotes his talents to the making of a plow assists the farmer in the tilling of the soil and the latter in the production of wheat to make bread helps the mechanic make the plow. The northern farmer in the production of wheat and corn assists the southern planter in the production of cotton and sugar cane and *vice versa*. The workers engaged in transportation and in merchandising help all the others engaged in any of these pursuits. All are co-workers engaged in the vast system of production.

The notion then that there is conflict of interests among these fellow workers is an astounding fallacy born of shortsightedness and misunderstanding that treat effects rather than cause. There is no more reason for the talk of conflict between North and South, or East and West, than there is for thinking of conflict between the two blades of a pair of scissors. It would be as sensible to talk of conflict between the Frigid and the Temperate Zones.

II. Government—A Labor-Saving Device—Defeating Its Purpose

The capacity of man to think and hence *to divide or exchange labor is the distinguishing feature* in methods of the procuring of a living as *between man and the lower animal*.

To limit in any way the energy of man to the satisfaction of the wants of a bare subsistence, is to attribute mistake to the God of Nature in equipping him with the gift of reason, since the lower animal, owning nothing and equipped only with bone, brawn and instinct, if undisturbed, outdoes man in this respect. And so far as the masses are concerned, we are wracking our brains to devise methods in order to procure a bare subsistence.

Man's error therefore must be in his social relationships. That error, I think, creeps in at the point where man's method of procuring a living deviates from that of the lower

animal—the difference being that *man in the social order exchanges labor; the lower animal does not*. This error involves a problem of saving—one that has been ignored, but which unfolds easily to any person who really seeks to solve it.

To treat a factor of a problem as a liability when in truth the factor is an asset would necessarily result in confusion. That is what we do as a social order. Government has been proclaimed as a gain to mankind from time immemorial. Yet it is persistently asserted that it is the duty of the citizen to support the government. It would be more proper to say that government should support itself, so that the citizen may support himself. If government is not at least self-supporting, upon what grounds may it be said to be a gain?

If the foregoing analysis is correct, then *government is an invention*—a labor-saving device or arrangement; and Sir William Blackstone, in his commentaries on the laws of England, was right in saying that the chief accomplishment of organized society is that it enables its citizens to engage in “mutual commerce.” I think he should have gone a step further and said that to promote mutual commerce is the *sole purpose* of government. Every able-bodied citizen of a legal order, properly administered, is a trader. If exchange is a part of the work of production, the accomplishment presupposes agreement or compact to some degree—and that in its simplest form is the beginning of government.

Government—a labor-saving device—employs citizens—as officers, agents, employees—and capital in order to promote exchange and it is therefore a *producer*—a necessary and an important factor in the vast program of *production*. But statesmen are zealously striving to devise means to *support this producer* on the assumption that it is a liability. This effort presents a startling contradiction.

If government was intended to promote mutual commerce, it will not have served its full purpose until it installs a governmental mechanism that actually promotes a system that admits of *mutual exchanges*—a system free and fair to every citizen.

To accomplish that purpose, it must throw into discard the time-worn notion that things which by their very nature are not *exchangeable* may arbitrarily, or by government edict,

be treated as exchangeable. What is the policy of government in this respect?

It requires but little reflection on the commonplace to show that government maintains a system that violates its intended purpose. As a government, we attempt to *validate the trading of values that are not exchangeable*. The result is violative of a principle that we, as Americans, have held sacred for a century and a half—that the citizen is entitled to live his own life, to equality of opportunity, and to reap the fruits of his labor.

(a) Error in the Law's Definition of Property Rights

This error, I think, is chargeable to education in the so-called Social Sciences. Among these sciences I include Law. As a lawyer, I think it proper first to put our own house in order. I think it can be shown that our legal philosophy has within it, and has had for centuries, a glaring mistake in its statement and treatment of the laws governing "property rights."

First, in the treatment of property rights, we have been trained to think of two classes of property—"real property" or interests of the individual in lands; and "personal property" or rights of the individual in movable things.

Secondly, in treating with the subject, the profession thinks only of the property rights of the individual, *as an individual*. If there is any treatment or well-organized thought upon property rights of government itself, or property rights of the individual as a joint owner with his fellow members of society, the treatment has escaped general notice.

I think the definitions and classifications thus made are arbitrary, illogical and detrimental to the individual and, in turn, to government, in that they do not square with the real law—the law of Nature.

Aside from the fact that tangible personal property is as "real" as a tract of land, the classification does not comport with the purpose for which government was established. In fact the civil law of Continental Europe has not emphasized the distinction between "real" and "personal" property as did the laws of England upon which our system was founded.

The citizen's right to have and to hold real property has occasioned much discussion by legal philosophers. Blackstone's statement that proprietary right therein is the im-

mediate gift of the Creator has been challenged, the argument being that the State is the source of all property rights. John Marshall stated that "the law of property in its origin and operation is the offspring of social state."

These opposing views, it seems to me, are both partially right—neither exactly right—though I may appear presumptuous in setting up my views as against such eminent authority. I think each of these opposing schools of thought has failed to point out the true reason why the social state is concerned with the rights of the citizen in so-called real property. I am unable to find any flaw in the argument that "land" which, as treated by the economists, includes all natural resources, is a gift of Nature. On the other hand it seems clear that organized society has some claim upon the establishment of the citizen's rights to a specific site. That claim is not an arbitrary one—but, if properly defined and treated, is rather in keeping with the natural right of a man to the ownership of that which he, by the exercise of his brain and brawn, wrests from the earth and modifies for use.

Since government is a social compact between individuals, as such, and all others acting jointly in the establishment of a labor-saving device—one that provides protection, security, the privilege of exchange—it produces a value that is reflected on land; and, to that extent, government has a paramount interest in land throughout its dominion. This interest is beneficial to the individual owner, and it is as essential to his rights that government be paid the fair value of its contribution—no more or less—as it is for all citizens to be paid for their contributions to the improvements installed on their respective tracts wherever located. But this principle is not recognized in our law. We do not "render unto Caesar the things that are Caesar's" and hence cannot render to the individual the things that are his.

(b) Production—The Natural Basis of Property Rights

The correction of this error by rendering to government and to the citizen that which is due each would reconcile the arguments of the opposing schools of thought in that law would then give due credit to the handiwork of Nature, to the individual and to the social order—to Nature, as the source of all wealth, though not wealth in itself; to

the individual, a producer and a consumer of wealth as Nature made him, though without the power in a state of nature *to enforce* his rights as such; to organized society, as the protecting and enforcing agency of the rights of the individual.

This failure of our system is partially due, I think, to the flaw in our law in the definition and classification of property rights.

This correction would also meet the second objection. It seems to me that the acquirement of a property right, whether it be in movable things or an interest in land, presupposes the application of labor, mental and physical, to some degree in modifying it for use or in reducing it to possession. Land in itself is not wealth, since wealth is a product of labor, and labor never did produce land—it produces *land value*. And land value can be made possible and reduced to possession only by the labor of individuals, as such, and individuals acting jointly as a social order. Therefore both the social order and the individual have an interest in land *solely by reason of the fact that each has contributed labor* to the reducing of it to possession—that is, in conferring upon it a distinctive character, an essential right of man as a social being. If the laborer is worthy of his hire in the one case, the *joint* laborers are worthy of their hire in the other—to the full extent of the labor or service rendered. It is this principle that answers the communistic theory that land should be common property. That idea is not only impracticable; it is in conflict with the very purpose of government.

The classification of property as real and personal imposes servitude and slavery upon the majority of individuals and is also at variance with the avowed purpose of government, as, I think, further reflection will show.

There is no difference in principle, from the standpoint of production, between the coat on a man's back and the house in which he lives. Both are products of human exertion; and the materials of which they are composed were taken—directly or indirectly—from the earth and modified for use through the various instrumentalities of exchange.

Both the coat and the house are exchangeable. Each of these products is a want that serves the owner in protecting him from the elements. The only difference is in

the manner of use. In the one case the product is attached to the person and moves about with him; in the other, the citizen goes to it to enjoy its benefit. For the same reason there is no difference in principle between a pile of lumber and that same lumber in place as part of the house. But the law treats both the coat and the pile of lumber as personal property and the house as real property. Consequently all of what was once personal and movable property when installed in or attached to land is defined as real property.

(c) The Commingling of Property Rights of the Citizen and the State

The error is not merely one in the choice of words. The injury arises because of the erroneous classification in that all human exertion that reflects value by way of improvements on land is treated as individual property and as an integral part of the land. But in that value of the realty is also a value that is not the product of individual work and hence, in the nature of things, is not an individual property right—and all the “King’s horses and all the King’s men” cannot make it so. The law merely attempts to recognize this last mentioned value as a kind of title in the individual. This title is without flesh—a *naked legal title*.

The nature of this value so erroneously treated as “real property” of the individual may be made clear by further reflection on the illustration of the farmer in the improvement of the farm. It is clear that the improvements installed by him, through the advancement of credit, resulted in an increase of value to the site. If this tract were still in a state of nature, without the benefit of the protection and facilities of organized society, we could think of the surface—and correctly—as a plane representing zero in value. With the coming of organized society and its facilities for the protection of property rights and the privileges of exchange, a value settled on the land as silently and as definitely as a blanket of snow is cast on the earth. That value was the result of the *joint* endeavors and activities of citizens in the establishment and maintenance of organized society. It may be represented by a dotted line drawn above the plane designated as zero. Were it not for the joint activities that caused that value, the farmer would not have dared the venture. His work, as shown, caused an additional value to attach; and that

value may be represented by a second dotted line drawn above the first.

The mischief of our legal reasoning creeps in at this point. Our boasted concept of justice takes a holiday. The most vicious system of bookkeeping known to man comes into play, and government gives or throws away its own earnings.

The annual value of public service represented by the space between the plane "zero" and the first dotted line, throughout the land as of the year 1930, was about twelve billion dollars, or about two billion more than enough to pay the country's tax bill as of that year, which approximated ten billion dollars. Government collected only about forty per centum, or \$4,800,000,000 of this value at that time. The citizens therefore in their joint enterprise as organized society lost about \$7,200,000,000 of their joint annual earnings. The year 1930 is used because our present methods of raising revenues are so far afield that, I think, no one could hazard a guess as to the extent of the error. To say that this error is immaterial because this amount goes into the hands of a small minority is as illogical as to say that a private corporation is not injured by giving to a small minority of its stockholders sixty per centum of its earnings.

Any individual or company that would so manage his or its business would go into bankruptcy. But government, under our man-made laws, has power that the individual or company does not have—the power of taxation. To attempt to make up this loss, government resorts to regulative taxation on the processes of exchange by the enactment of income, sales, license, stamp and various other taxing laws each of which burdens the legitimate processes of exchange by causing an arbitrary raise of price. The result is that government, instead of promoting exchange, slows down and impedes it, and hence defeats its own purpose.

This reasoning by our citizenship, directed, of course, by leaders supposedly learned in statecraft, to say the least, displays a startling omission to apply commonplace knowledge to the affairs of government. The average citizen knows the effect of an arbitrary raise of price of an article for which he has need. He either postpones the purchase or drops the desire for it entirely. He also knows that if three men

work jointly and one receives all he earns and half or more of the earnings of the other two—and that method of distribution is continued—the two must exist on less than they earn. The other, since he cannot eat, wear, and use much more than either of his co-workers, can eventually retire and live on so-called savings that he did not earn. The two will barely exist, or become objects of charity, and hence become perfect subjects for the solicitude of that modern school of statesmanship that proposes by some magic power to capitalize inactivity—the rampant pension and dole advocates.

This explains on a small scale the result of the failure of government to collect in full the annual use value, at a current rate of interest, of its public service. Since the public account does not balance, government resorts to regulative taxation. The cost of production—including exchange—necessarily raises. Citizens as an aggregate are unable to buy back all they are able to produce as an aggregate—equipped as they are with efficient labor-saving devices—markets abroad are lost, and foreign producers successfully invade our own markets. Unemployment and under-consumption, twin evils of social mismanagement, spread their deadly effect throughout the land. The vicious cycle goes on and on until we as a people have succumbed to the notion that time itself is measured in alternating periods of prosperity and depression.

III. The Problem Reduced to Statement

Since labor properly directed, reflects value, and justice demands that the producer shall have the benefit of that value, it follows that government in failing to collect the returns upon its own service is in the position of a careless person that loses his earnings as fast as he makes them. The difference is that society permits the individual loser to recover against the finder but legalizes the title of its own earnings in the hands of the individual. Under our system therefore a public product is capitalized as individual property and is bought and sold as such, though it is not in fact exchangeable. Our citizens therefore—as traders in their various capacities—must pay individuals for conveniences afforded by the whole community in the prices for places upon which to build and work and live. In this vicious process in drawing upon individual earnings to retrieve the

loss, production is caught between two millstones. The suggestion that "we have solved the problem of production and now we must solve the problem of distribution" is an idle boast. We have solved neither of these problems. We merely know *how to make things* and it is utterly impossible to distribute equitably because, as a matter of simple mathematics, *we can't* under our system of legislative bookkeeping.

The cruelties of government in the control of its subjects have long since passed out; and the power of taxation is the only practicable method of depriving the citizen of rights and opportunity. This encroachment, I think, is due to the confusion of the purpose of government with functions of its parts or mechanisms. If we would think of government as a marvelous machine constructed, maintained and operated for one purpose—to promote exchange—there would be no occasion for confusion.

As an instrumentality of exchange, government *accelerates* and it *regulates*. It is the purpose in this discussion to deal largely with the activities resorted to for the purpose of raising revenue.

To accelerate exchange, government should be able, as a producer, to go forward on its own power. This it can do, as shown, by the collection and use of its entire annual earnings. It should also be equipped with a device for slowing down or even stopping in the dangerous places where that result is proper. Vehicular traffic of a century ago was equipped with both devices. The farmer of that period knew the difference in the uses of a whip and a rub-brake. He knew that a rub-brake clamped against a wheel would slow down or stop forward motion—and that result was desirable at times in the interest of progress. Regulatory taxation is the rub-brake on the wheels of exchange. Only statesmen and economists fumbling with governmental mechanism try to make a rub-brake serve as an accelerator.

The power of regulation, properly directed, has various laudable applications. It has uses *preventive* and *corrective* known as "police powers," and these, in the last analysis, serve the same purpose—protection.

In the exercise of the first of these, government takes time by the forelock in its endeavor to develop a better citizenship and thus avoid resort to the corrective measures. As an example, government promotes and fosters the public

school system on the theory that it is a refining influence and hence a good investment. The citizen is thus relieved of the duty of educating his own children. He attains a better result through exchange.

The maintenance of facilities for the care of the disabled and the incompetents serves a like purpose. Under an orderly system, government cares for the disabled, not solely for their benefit but for the same reason that it institutes health and safety measures or drains a swamp or constructs sewage facilities—to protect the rights of the citizens generally in the exercise of the privilege of mutual commerce. The institutions maintained for impounding criminals are examples of the *corrective* facilities. Regulation of dangerous practices or businesses is also proper under the police power. For instance, dynamite is a useful, labor-saving device, but its production and use require regulation. A farmer by its use could perhaps clear a field of rocks or stumps in a week and thus avoid months of burdensome toil. He can well afford to pay for the regulation.

Some of these activities are not inherently dangerous and hence should not be penalized. The cost of maintenance should be met by the annual earnings of government. Practices and things that, by their nature, are hazardous and dangerous should be slowed down by regulatory penalties. Others are wholly detrimental and should be stopped completely under the power of government to define crimes.

Though regulation of activities may seem an interference at times with individual property rights, the distinction is that there is no vested property right in activities that are detrimental to the public health, safety, morals or convenience. If that distinction were always as a matter of cold logic kept in mind the majority of our regulative measures would pass out.

If the foregoing analysis is correct, I think the social problem—which is merely the problem of living—should be reduced to a definite statement so that the citizens and their public servant would at least have a better conception of the end to be attained. That practice is not new in other fields of science and no one would contend that the other sciences are not far in advance of the so-called social sciences. Though this statement might be considered as purely economic, I think it involves legal principles. In fact I do not see how

Law can be disassociated from the broader science known as Sociology. I shall undertake to state the problem and in the statement I shall use words that require definition.

Human energy applied to the resources of this earth produces *wealth*. "Wealth" consists of things that satisfy human wants, such as food, clothing, shelter, books—in fact all the necessities and luxuries of life—and also tools and equipment used in the production of these wants and desires. The tools and equipment of industry I understand to be "capital"; hence capital is a part of wealth. The return upon human energy is "wages" and, since capital is but the extension of human energy into tools and equipment, the return upon capital is in fact wages, though it is usually defined as "interest."

Human energy in the social order is dual in character—individual and social. The earnings in each of these capacities are separate and distinct; and hence all the wages of the individual as such belong to, and should be credited to, the individual. All the earnings or wages of government should be collected by government and used solely for one purpose—to pay the cost of government; in other words, we should "render unto Caesar the things that are Caesar's." The wages or earnings of government I understand to be "economic rent" or the value of public service reflected on sites or locations, it being similar in character to the value that attaches to land by reason of the building of improvements by an individual, except that economic rent is the result of community activity and hence *incapable of being distributed* among the members of society who jointly produce it; while the value of governments made and used by the individual may be, and should be, separated and credited to him in full.

To accomplish these purposes, I think we should have a rule of procedure, constitutional in character and understandable. I think the Constitution contains such a rule under a proper construction of its provisions. I shall undertake to state a rule; and, until I am convinced of error or until it is better stated, I shall contend that this rule should govern our legislation:

Wants and desires produced through individual effort—wealth—necessary to the life or helpful in the improvement of the mind or beneficial to the health and happiness of

citizens, or any individual labor or service of any kind, either direct or in the form of capital, used or employed in the production and exchange of such wants and desires should not be taxed or penalized in any manner.

From this rule, two corollaries necessarily follow:

First, regulatory taxation under the police power, which curbs or limits exchange, should be applied sparingly and then only to practices, enterprises or things that, without regulation, are detrimental or hazardous to the public health, safety, morals or convenience. Practices wholly detrimental should be subjected to prohibitive penalties under the administration of criminal laws.

Secondly, government, being a corporation designed to aid man in the production of wealth, has an earning capacity equal to the cost of operation; hence, the earnings or wages of government—economic rent—should be collected in full at an annual rate based on its value, in the manner that interest is collected on capital, and used solely for the payment of such cost.

IV. The Rule In Operation—Its Effects

The statement of the problem and the rule, I think, prescribes merely a *method of procedure* to harmonize our law and economic policy with truth. I think some of the older legal philosophers were correct in their conclusion that, in the last analysis, sovereignty does not reside in the people. If it does, then, as suggested by Philomen Bliss, the citizen becomes both sovereign and subject—a contradiction in terms. He reasoned therefore that the genius of Solomon was not displayed in his judgment that awarded the child to the mother as against the claim of an impostor, but rather in the startling method—the procedure—he adopted for the discovery of truth. Solomon in all his glory and with all his power could only *enforce*, he could not *make*, the law that bound the child to the mother. That law had existed in nature since the morning of time. In other words, Solomon bowed to the real Sovereignty—Justice.

Justice, always on the throne, is not deceived by legislation bearing high-sounding names. Conditions often referred to as injustices are merely the effects of Justice at work meting out punishment.

Though a regulatory device accomplishes what the name

implies, we persist in applying it indiscriminately to practices—good and bad. The assumption seems to be that it will by some magic power not only withhold its curbing effect in the one case and not in the other but will grind out revenue in abundance in both cases. It is not strange therefore that the old argument against “double taxation” has succumbed to the onslaught of the tax experts, whose cry for a “broadening of the tax base” was to solve forever the tax problem. Nor that text writers and digesters in lengthy and fine-spun argument attempt to define and distinguish taxing laws with reference to kind and character. But, when all is said, any thinking person without strenuous effort may apply the rule and determine for himself that there are but *two general classes* and that mere names serve no purpose other than to burden the memory and confuse the mind.

One of these methods is *regulatory* and operates in the nature of a penalty upon the products of *individual labor*. The other, strictly speaking, is *not a tax* at all. It amounts merely to the collection by government of wages and interest for services rendered as a producer. In the complete adoption of the latter method lies the only hope for the realization of the slogan that “every citizen should contribute to the government in proportion to the benefits received.”

The attempts to put this slogan into practice, however, display little conception of the purpose of regulation and certainly less observation of its effects. One example will suffice. As a government, we reason that citizens operating motor-driven vehicles should build and maintain the highways through taxation on motive power. The assumption seems to be that the farmer in the trucking of grain, vegetables and livestock to the cities confers no benefit on the city dweller who owns no vehicle save a baby cab. Are not all the *users* of the highways in some manner *exchanging their* labors? Are not we all, directly or indirectly, *users* of the highways and transportation facilities of every kind? Are not the pleasure seekers putting men to work in every branch of the automobile industry?

The rule recognizes that the interests of our citizenship are relative—not in conflict. This simple truth, though generally conceded, has been strangely neglected in practice. Proposals have been made and enacted purportedly to relieve the home owner from burdensome taxation. It is gen-

erally known that the acquirement of a home by the average wage earner is much too difficult. But, strange to say, the attempts to encourage the home owner have so far failed to recognize that it is equally important to cease the penalizing of the operators of business and industry. The attempted distinction between business property and homesteads in some of these proposals ignores the fact that a place to work is as important as a place to live and that to penalize business and industry is to penalize citizens generally as traders. Instead of promoting home ownership, our present policies are encouraging speculation by individuals in vast tracts of land, thus establishing a system that will lock the door of opportunity for generations.

The proposed rule recognizes that citizens are engaged in a common enterprise. The practical operation of the rule may be stated as follows:

Industry—whether farming, manufacturing, merchandising, transportation or what not—and also the home owner and the tenant, wherever located, would be relieved of all taxation, except upon the dangerous enterprises and things logically falling within the first corollary; and would pay only the annual use value of public service reflected on the sites owned, used or occupied by them respectively. In the case of the tenant, he would merely hand this annual use value to the owner, together with the interest or rent charge on the buildings and improvements of every kind installed by the owner. The owner in turn would hand the amount due for public service to the government, retaining all the interest on his own investment. This value of public service, since it attaches to the legal title to sites, is used by the tenant to the same extent as though he owned the land; hence the owner collects and the tenant pays for the public service. One of the destructive fallacies of modern reasoning would pass out—that is, the notion that the property owner large or small, or the tenant, is aided by a tax on intangibles, such as mortgages. The assumption seems to be that a mortgage for \$5,000 on a tract and the improvements worth \$10,000 has the magic power to bring into being taxable property of the value of \$15,000. The effect, however, is to place an additional burden on the user of the property, since the tax is added to the interest rate and he pays it

as interest. The same reasoning applies to numerous applications of our taxing regulations.

The adoption of the rule would introduce the man that nobody seems to know—the individualist. That is true because his antagonist has mentally constructed a monstrosity—half socialistic and half that indefinable something dubbed as capitalistic—and has named it “individualistic.” The individualist, as currently described, seems to be found in a one-sided battle waged in the jungle between a giant armed with a knotted club and an unarmed pygmy; or—to make the picture more modern—a struggle in which the giant operator of industry wields a legalized economic club against his helper. The critics of individualism have not as yet stated just which one of these is the individualist. It is only by inference that the giant in either case is the guilty one.

The pity of all this is that those purporting to champion the right of every man to live his own life in his own way and to reap all the fruits of his labor, mental and physical, have in effect accepted the gage of battle as thus drawn. Of course, they have lost the argument, made as self-constituted proxies for the individualist. The true individualist is as strange to a faulty social system as he was to the jungle. Those who think they see him in either the man that gets more, or the man that gets less, than the fruits of his labor have their telescopes trained in the wrong direction.

Another false assumption closely akin to this is that there is such a thing as a “capitalistic system of government”—and our system is referred to as such. The assertion, to me, is beyond intelligent comprehension. I see no difference in principle between a gardener employing capital in the form of a wheelbarrow and the operator of a factory employing capital to make the wheelbarrow. It is the business of government to see that each shall have the opportunity to reap the fruits of his labor, including the labor extended into his tools and equipment. But certainly a method of production through the use of tools cannot be correctly classified as a form of government. If it can, then at what point since man used a forked stick as capital did the capitalistic system begin, and in what land is capital not used in the production of wealth?

The rule recognizes that every able-bodied citizen is a producer and a consumer and hence a unit composed of sup-

ply and demand. "Supply" and "demand" then are interchangeable terms and, under a just economy, would be in balance. The real medium of exchange is human exertion and not money.

The scholastic economists, I think, have made the social problem entirely too difficult. They have asserted for years that there are three factors of production—"land," "labor" and "capital," which are reflected in "rent," "wages" and "interest." It is obvious that "production" depends solely upon man. The assertion that man cannot produce wealth—that is to say, he cannot *live*—without access to land is self-evident. It would be equally enlightening to say that one's arm cannot function without access to his body. Man, as a physical being, is a part of the earth, and hence land is presupposed.

The mischief in the treatment of land as a factor of production lies in the disposition of its corresponding elemental—"rent." The economists treat this return in exactly the same manner as it is treated in the science of Law. It is at this point that Education in the Law and Economics should get together and compare notes. If the error does not lie in the system of bookkeeping previously pointed out in this discussion, then the scholars should tell us where it does lie. The assumption that Economics must forever be the "dismal science" is not very satisfactory to inquiring minds. If that be the answer, then this analysis at least has merit in this: it has never been tried.

The result of the adoption and approval of this error by the social sciences is that the processes of exchange have ever been off balance—and the effects break out in varied and ghastly forms. The effects can be partially identified by the governmental agencies devoted to social service of varied and numerous types. The error has also resulted in the announcement of so-called *laws* by the economists that, I think, are but the effects of the violation of law. The so-called law of "supply and demand" is meaningless. The same is true, I think, of the "law of money" to which has been attached the name of its purported discoverer—Gresham. That "law" is to the effect that cheap or over-valued money will drive out of circulation good or under-valued money. What is "cheap" money? It would seem that this purported law presupposes arbitrary action—that is, the over-valuation

of one kind of money with reference to another. If a bushel of corn were arbitrarily made by law in a given locality the equivalent of a bushel of wheat, the effect there upon the trading of corn and wheat could hardly be said to be a *law*. If it could, then the first trader taking advantage of the effect by exchanging wheat in a normal market for corn and paying his debts in the abnormal market with corn should be credited with the discovery of the law. If the first effect constitutes the "law of money" then the latter constitutes the "law of grain." It would seem more proper to say the arbitrary action in the first instance was just another attempt of man to *make law*, and let the subject rest.

The attempts of man to make and to announce laws demonstrate the crying need for a rule to test or measure proposals offered for the common good. The statement of a rule necessitates the placing of first things *first*. Reason would therefore seem to dictate that we cut through the nonessentials to the prime function of government—*production*. And that is to say, there is but one factor that counts in the economic process—human energy. But, since human energy in the legal order is exercised in two capacities—distinct and separate—Education in the social sciences should revise its system of bookkeeping.

V. Is The Rule Within The Constitution?

The purpose of the criticism of Education in the social sciences was to take apart the problem and to show the correctness of the rule as a legislative yardstick. We should know what has been done to determine how much, if any, of the social structure may serve as a foundation upon which to build. If the forefathers erred, we should know wherein they erred. If the Constitution needs amendment, we should know why and in what particular it fails.

The forefathers had a slogan. Fortunately we can interpret its meaning from their conduct. Their slogan was "taxation without representation!" The assumption now seems to be that the colonists complained solely because they were "without representation." Would representation have rendered the tax holy? "Representation" could hardly glorify the imposition of taxing measures that out-George King George and his ministry in their wildest moments.

The colonists' complaint was against taxation. They evidently thought representation would at least give them an opportunity to be heard. George Washington, as early as 1765, made clear his views on the Stamp Act in a letter to a British uncle of Mrs. Washington. Thayer's "George Washington" quotes him as saying the colonists looked upon the act as an "*unconstitutional* method of taxation." The letter further states "**** the advantage accruing to the Mother Country will fall greatly short of the expectation of the ministry *** that an whole substance does already in a manner flow to Great Britain, and that whatsoever contributes to lessen our importations must be hurtful to their manufacturies." The letter then points out that the colonists would cease to buy the luxuries produced in England and that the "necessaries of life" could be produced at home. "If Great Britain, therefore, loads her manufacturies with heavy taxes, will it not facilitate these measures?", he asked, following his statement that the policy would stimulate like industries in the colonies.

Our America, through like methods of taxation, now occupies the place of England in this reasoning of Washington. If there are those who doubt, they should step into a modern grocery store and ask for a carton of meat packed in Uruguay or the Argentine. Government reports of the importations of grain and other farm products might also prove of interest.

The forefathers wrote into the Constitution the fifth amendment, which, like that in the constitutions of the states, recognizes the rights of the citizen to "life, liberty or property" and provides, "Nor shall private property be taken by law for a public use without just compensation."

The intent then of the founding fathers to protect property rights of the citizen is plain, since the "just compensation" clause not only *recognizes* the existence of such rights but protects them even as against confiscation by the government. It would seem then that if the government, under the taxing clauses, may in effect take private property under the guise of taxation, the founders arrived at a paradox in their reasoning, since the "just compensation" clause and the taxing clauses would be in conflict. The explanation in some of the adjudicated cases that the power of eminent domain is one principle and that of the taxing clauses is

another, in an attempt to reconcile the two, is not convincing. The explanation ignores the rule of construction that a system of laws should if possible be construed as a harmonious whole. It also attempts to justify the accomplishment by indirection of that which may not be accomplished directly.

The error, I think, is due to the false assumption that government is a liability rather than a producer. This assumption never appeared more strongly, I think, than in a recent case upholding the taxing of income of federal employees under a non-discriminatory act of the State of New York.¹ The legislative policy that received judicial sanction in that case may well be studied to prove or disprove the rule proposed in this discussion.

The concurring opinion of Mr. Justice Frankfurter criticises the statement of Chief Justice Marshall in *McCulloch v. Maryland* that "the power to tax involves the power to destroy."² The remark, he says, was unfortunate and that it was given currency "partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes ***"³ But, since he admits that the arguments in the *McCulloch* opinion "had their roots in actuality,"⁴ it would seem that the result reached by Chief Justice Marshall in striking down the taxing act involved in the *McCulloch* case has the approval of Mr. Justice Frankfurter. It is therefore difficult to follow the latter's reasoning when he says "the web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this Court sits.'"⁵ Since the *Graves* case recognizes more power in the legislature with reference to taxing measures of the character involved than the *McCulloch* case, one could hardly infer that Marshall's statement that "the power to tax involves the power to destroy" was swept away by the statement "That the power to tax is not the power to destroy while this Court sits." Evidently John Marshall would have approved the latter statement, though he perhaps would not have concurred in the result reached in the *Graves*

¹ *Graves v. New York ex rel.* 306 U.S. 466 (1939).

² 4 Wheat. 316 (17 U.S. 316, 1819).

³ *Graves v. New York ex rel.* 306 U.S. 466, 489 (1939).

⁴ *Id.* at 488.

⁵ *Id.* at 490.

case. This is true, I think, because the *Graves* case strikes down former holdings of the Court to the effect that "the salary of an officer or employee of one government or its instrumentality was immune from taxation by the other."⁶

The majority opinion quotes from several recognized economists. The reasoning seems to recognize "that a non-discriminatory tax on the income of all members of the community" casts a burden upon them but to no greater extent "than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may raise the price level of labor and materials."⁷ The opinion emphasizes the duty of the citizen to support the government. To avoid the doctrine of governmental immunity, the opinion distinguishes the taxing measure on the ground that the tax does not attach until the salary is in the hands of the employee. The reasoning also shows that a tax may not be imposed on the instrumentalities or the property of government.

The concurring opinion uses this language:

"Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount."⁸

The economic policy back of the legislation, I think, is a failure for reasons already stated. That a tax on individual property raises the price of exchange is admitted. The distinction between a tax imposed on salaries of government employees and a tax on government property is not convincing, since the property is capital or stored-up human exertion. The fact that the tax does not attach until after the compensation is in the hands of the employee does not alter the case. The result in either case is that the employee receives less than he earns or his salary is too high.

But, aside from all this, it would seem that the taxation of the salaries of government employees is illogical. The

⁶ *Id.* at 481.

⁷ *Id.* at 484.

⁸ *Id.* at 490.

employment by a farmer of a helper at the rate of \$75 a month on condition that the helper pay back \$25 a month for his room and board would present a case similar in principle. The ceremony in such cases is usually simplified by the farmer's payment of \$50 a month and neither party seems to notice any difference in the result. The government, however, by imposing the tax incurs the cost of collection and of additional bookkeeping. But, if there is merit in the policy, the salaries of government employees should be increased to ten fold their present amounts and nine-tenths taken back through taxation. The perplexing question of the payment of the national debt would be solved.

The purpose in reciting this judicial history was to show the trend of subsequent taxing legislation with reference to methods adopted by the forefathers for meeting the costs of the federal government. It may be claiming too much to say that they made no mistake in the drafting of the Constitution. The fact remains, however, that they resorted to regulative measures and those measures were applied to practices and things looked upon as harmful in the absence of regulation. Though regulative measures are not designed for purely revenue-raising purposes, the federal government no doubt could have *collected* a sufficient amount by such method to pay its expenses, but it should be borne in mind that not all the evils and hence expense of the practices so regulated fell on the federal government. The incidents of abuse in the use of intoxicants certainly did not. It was not beyond the possibilities then that the federal government could have operated on the taxes collected under regulative measures if the states had confined their taxing policies solely to the collection of wages and interest of government as defined in the second corollary of the rule herein proposed. But the states, as previously pointed out, resorted to taxing measures regulative in effect, though they were not looked upon as such, long before the ventures by them into fields formerly worked exclusively by the federal government. The deadly effect of the methods adopted by the states was not so apparent until about the turn of the century when the last of the homestead lands had been taken up. These lands—the “pop-valve” of the governmental mechanism—tended to relieve the pressure. In their going, the pressure became more pronounced. The alternating

shifts from so-called prosperity to depression became more swift and frequent. The unemployment problem became more complex, government began to expand and its needs "began steadily to mount."

Basing my opinion on the acts, conduct and writings of some of the founding fathers, I am not prepared to say they did not see in the offing the conditions that beset the country. The statements of Washington previously quoted, followed to their logical conclusion, leads to the rule contended for in this discussion. But let us assume otherwise. In the *Graves* case Mr. Justice Frankfurter states that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."⁹ Since taxing measures, through the application of the doctrines of classification and of selection, have been upheld as against every kind of property known—and as against other things not in fact property—I ask if there is any reason why a logical and sensible classification of property for taxing legislation may not be made on the basis of the rule herein proposed.

If there ever were ground for doubt, I think the ground has been swept away. We wobbled into position in the adoption of the Income Tax Amendment. Though the use of the amendment has served to accomplish ends that the forefathers fought, bled and died to blot out, the fact remains we built better than we knew. Fortunately, in the adoption of the amendment, the people did not bind the Congress to any particular kind of income-tax measure. I think we have not yet discovered the power of the amendment: It is a broad one:

"The Congress shall have the power to lay and collect taxes on incomes from *whatever source* derived, without apportionment among the several States, and without regard to any census or enumeration."¹⁰

The use value of "real estate" has been held to be income. This is true with reference to residence property occupied by the owner. The Wisconsin Supreme Court held valid an act providing for the taxation as income of the estimated rental value of residence property occupied by the owner.¹¹

⁹ *Id.* at 491, 492.

¹⁰ U.S. CONST. AMEND. XVI.

¹¹ *State ex rel. v. Frear*, 148 Wis. 456, 134 N.W. 673 (1912).

The Court reasons that "income need not be money . . . that which is convertible into money"¹² is income.

If the use value of residence property may be taxed as income, then the community-made value that attaches to the legal title to sites, exclusive of improvements made by the owner of every kind, would be a proper subject for selection. This value could be as readily determined as the income from the land and the improvements. Taxing laws now provide for the separation of land and improvements for the purpose of valuation. In special assessment proceedings, we have for years determined just such questions.

In the case of *Lutz v. Arnold*¹³ the Indiana Supreme Court, in stating the rule governing classification, held that any classification is valid that rests "upon some ground of difference having a fair and substantial relation to the object of the legislation, so all persons similarly circumstanced shall be treated alike." In a concurring opinion, Mr. Justice Treanor further states that subjects may be "selected" for taxation.¹⁴ He points out that things now taxed as "property" have not always been reached by our taxing laws. He shows that certain kinds of "personal property" have been omitted from, and later included in, our taxing legislation.

Is there a substantial difference between the products of individual labor that constitute property and the product of community activity and development? What revenue measure in recent years has been more clearly within the letter and the spirit of the Constitution, federal or state? Would not that classification be better than measures that build barriers between the states? We now accomplish by indirection a practice that is expressly prohibited by the Constitution—the imposition of taxes or duties by a state as against the exports of another state. The effect, despite fine-spun theory, is the same as legislation imposing duties on products shipped from state to state. If our Constitution was intended to form a more perfect union and to insure the citizen the right to life, liberty and the pursuit of happiness, why would not the freeing from taxing measures of the necessities of life be a just and valid policy?

It follows that by proper legislation, we could eliminate

¹² *Id.* at 691.

¹³ 193 N.E. 840, 847, 208 Ind. 480, 499 (1935).

¹⁴ *Lutz v. Arnold*, 208 Ind. 480, 518 (1935).

from taxation all personal property such as food, clothing, household goods, equipment, in fact all the necessities of life. These things, like buildings and improvements on and in the land, are products of individual labor and wants that are exchangeable. Improvements on and in the land—even the advantage of a high state of productivity or fertility—due to individual labor fall in that class of wealth known as capital.

Public service afforded the user of land is also wealth. Much of it, for instance, a paved highway, is *capital*. But, since it is available to every citizen, it is not exchangeable. It is rather a facility for exchange. It affords the same service to a rundown farm as it does to a highly improved farm just across the road. But we penalize the thrifty husbandman and pin the medal of low assessment on the careless and backward.

Upon the adoption of the principle, a method of apportionment among federal, state and local governments could be worked out in much the same manner as taxes are now apportioned between the state and local governments.

We should not lose sight of the fact that the individual came into the social order with one hand outstretched for the want that another could better produce. In the other hand, he extended, or was willing to extend, the want that he could better produce. In the last analysis, each individual is a trader with every other. Though one may have no direct negotiations with another, the latter trades with a third, the third with a fourth and on and on the process may continue indefinitely. But any alert mind, I think, can see that eventually there is exchange between the two that apparently have "no dealings."

"All served, all serving; nothing stands alone,
The chain holds on; and where it ends, unknown."

The total demand of the people is the equivalent of their earning capacity. This principle, I think, is written large in the rule proposed for the solution of the social problem. The principle is neither new nor old. It is a part of nature's setup. Its force cannot be suspended by the whimsical gestures of mankind. Our present methods were old-fashioned long before the forefathers appeared on the scene of action. They clashed with old nations. There were differences of

opinion in their day. The differences between Washington and Jefferson have been stressed in our political history, but Washington thought enough of Jefferson to make him his Secretary of State. Their differences, I think, did not extend to the regulation of individual rights. The writings of Washington, Jefferson and Franklin show that they were not entirely satisfied with the accomplishments of their day. They hoped and expected that future generations would correct—not enlarge—the mistakes they could not avoid.

Has Education or Statesmanship been equal to the task? Have we as citizens lived up to the hopes of the great champions of representative democracy?

If we cannot read the answer in the fall of empires of an ancient day, we can ponder the ruins near at hand. In those ruins lies the problem of living. The principle involved in its solution was announced almost two thousand years ago: "Render unto Caesar the things that are Caesar's." When the wisdom of this "new age" catches the full force of this admonition, a bewildered people may look into the future with renewed hope for a better day—a day when truth shall triumph over error and our democracy shall "render unto every man his due."

